PETITION FOR A WRIT OF CERTIORARI

(4)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 340

JOHN O. MURRAY,

Petitioner,

vs.

BUSTER NED, A MINOR, LULEDA BAPTISTE, NEE NED; LEE BAPTISTE, HER HUSBAND, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

REUEL W. LITTLE,
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BUSTER NED, A MINOR, LULEDA BAPTISTE, NEE NED; LEE BAPTISTE, HER HUSBAND; MOSES JOHNSON; STATE OF OKLAHOMA, EX REL., OKLAHOMA TAX COMMISSION; AND THE HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES AND ASSIGNS, IMMEDIATE AND REMOTE, OF WILLIE TOM, DECEASED, FULL-BLOOD MISSISSIPPI CHOCTAW, ROLL NO. 927; AND FRANK NED, DECEASED FULL-BLOOD MISSISSIPPI CHOCTAW, ROLL NO. 264; AND UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner, John O. Murray, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in the above entitled cause on February 19, 1943, affirming the judgment rendered by the United States District Court for the Eastern District of Oklahoma.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 21-24) is reported in 135 Fed. (2d) 407. The District Court did not write an opinion. Its findings, conclusions and judgment appear at pages 11-17 of the Record.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Tenth Circuit here sought to be reviewed was entered on February 19, 1943 (R. 24). A petition for rehearing was timely filed (R. 25) and it was denied on March 24, 1943 (R. 26). A timely petition for rehearing was thereafter filed with permission of the court (R. 28-30) and this was denied on June 12, 1943 (R. 30). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether under the Act of January 27, 1933, c. 23, 47 Stat. 777, lands purchased by a citizen of Oklahoma who is a member of the Five Civilized Tribes with unrestricted funds and on an unrestricted form of deed, descends on his death to his full-blood Indian heirs subject to the same restrictions against alienation that apply to restricted allotted lands. (The material part of the Act of January 27, 1933, c. 23, 47 Stat. 777, is printed as Appendix A).

Statement.

The facts are undisputed and a correct and concise statement of the same is set forth in the opinion of the Circuit Court of Appeals (R. 21-24).

Specification of Error To Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the deed from the heir of Frank Ned

to John O. Murray required approval of the County Court of Marshall County, Oklahoma.

2. In affirming the judgment of the District Court and holding that upon the death of Frank Ned the lands descended to his full-blood heirs, subject to restrictions.

Reasons for Granting Writ.

1. The decision of the Circuit Court of Appeals will unquestionably cloud and affect the security of titles to lands in the State of Oklahoma and in other States. No one ever dreamed that the Act of January 27, 1933, c. 23, 47 Stat. 777, would restrict the full-blood Indian heirs of any and every property owner regardless how that owner acquired title and regardless whether that owner was white or Indian. If Section 8 of the Act of January 27, 1933, c. 23, 47 Stat. 777, operates as a reimposition of restrictions upon lands inherited by a full-blood Indian from an ancestor in whose hands the lands were free of restrictions, there would be no record evidence upon which citizens of Oklahoma acquiring title to such lands could determine whether the title was owned by ancestors of Indian blood and that the heirs are full-blood Indians and subject to Federal restriction.

Before the decision of the District Court in this case, it was well established that only restricted lands acquired by inheritance or devise by a full-blood Indian from an allottee or full-blood heir or devisee remained restricted.[1]

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[1] Parker vs Richard, 250 U. S. 235, 39 S. Ct. 442, 63 L. Ed. 915;
Harris vs Bell 254 U. S. 103, 41 S. Ct. 49, 655 L. Ed. 159;
Commissioner of Internal Revenue vs Owen, C. C. A. 10, 78 Fed. (2nd) 768, 769;
Holmes vs United States, C. C. A. 10, 53 Fed. (2nd) 960;
United States vs Mid-Continent Petroleum Company, C. C. A. 10, 67 Fed. (2nd) 37;
United States vs Easley, 33 Fed. Supp. 442.

Never before has any Court held that restrictions applied to land acquired by inheritance by full-blood Indians from a decedent, who, during his lifetime, acquired title by private purchase with unrestricted funds and on a unrestricted form of deed, free of restrictions.

The decision of the Circuit Court in this case is erroneously based upon the decisions of that Court in the case of *Whitchurch* vs. *Palmer,* C. C. A. 10, 92 Fed. (2nd) 249, and *McCurtain* vs. *Palmer,* C. C. A. 10, 121 Fed. (2nd) 1009.[2]

It is true that in this case the lands involved were originally allotted restricted lands and that upon the death of the allottee the lands descended to full-blood heirs subject to the qualified restriction contained in Section 9 of the Act of May 27, 1908, 35 Stat. 312, as amended by Act of April 12, 1926, 44 Stat. 239, and the Act of May 10, 1928, 45 Stat. 495. See cases cited under foot note (1) above. This qualified restriction upon the land herein involved was removed when all but one of the heirs conveyed their interests to Frank Ned, which deeds were approved by the proper County Court. Frank Ned, although a full-blood enrolled Indian became vested with the title to said land, free and clear of all restrictions, since he acquired the same by pur-

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[2] The Circuit Court in the case of Whitchurch vs Crawford 92 Fed. (2nd) 249, recognized that the lands therein involved were at all times restricted prior to and at the time of the inheritance by Watson Palmer, a full-blood. Watson Palmer took not directly but through remote inheritance from the deceased allottee. The Government contended and the Circuit Court so indicated that the land was restricted under the Act of April 12, 1926. The Government so contended that the lands were at all times restricted and even at the present time so contends.

Donald Horton Grisso vs United States, C. C. A. 10, No. 2708, pending.

In the case of McCurtain vs Palmer, C. C. A. 10, 121 Fed. (2nd) 1009, the court here again recognized that the lands therein involved were restricted on and prior to the inheritance by Watson Palmer, a full-blood. See United States vs Watashe, 102 Fed. (2nd) 428, 431. The Government has always contended that lands of the class involved in the McCurtain case remained restricted after April 26, 1931. The Government at the present time urges this contention in the case of United States vs Williams, C. C. A. 10, No. 2716, pending.

chase with funds that were entirely unrestricted and on an unrestricted form of deed. The fact that Frank Ned was a full-blood Indian places him in no different position than if he had been a non-Indian citizen. All members of the Five Civilized Tribes in Oklahoma have become full-fledged citizens of the State by virtue of the laws passed by Congress. *Oklahoma Tax Commissioner* vs. *United States,* 87 S. Ct. 1233, 1239. Therefore, members of the Five Civilized Tribes are clothed with the same right as white persons in the purchase and sale of property, both real and personal where the purchase is made with unrestricted funds. The Government has at no time contended in this case that the lands were restricted while title thereto was owned and held by Frank Ned and this is the first time the Government has asserted that unrestricted lands of the class involved in this case, title to which is cast by descent to full-blood Indian heirs, are restricted in their hands.

2. The decision of the Circuit Court in this case construing the Act of January 27, 1933 (47 Stat. 777) is contrary to a former decision of said Court in the case of *Glenn* vs. *Lewis* (C. C. A. 10, 105 Fed. (2d) 398, 401) wherein the Court, referring to the 1933 Act, said:

> "Furthermore, the first proviso deals with lands acquired by inheritance or devise. Allotted lands acquired through inheritance or devise by full-blood Indians were already restricted by Section 9 of the Act of May 27, 1908 as amended by the Act of April 12, 1926, and to the extent of one hundred sixty acres when a tax exemption certificate had issued therefor, exempt from taxation by the Act of May 10, 1928, *and it was unnecessary to impose restrictions or provide for tax exemption as to full-blood Indian heirs or devisees. This indicates an intention on the part of Congress to deal with an Indian heir or devisee of less than a full-blood.*"

The decision of the Circuit Court in this case construing the 1933 Act as reimposing restrictions upon lands of the class involved herein is contrary to the construction of said Act given by this Court in the case of *Oklahoma Tax Commission* vs. *United States* supra, wherein this Court in reviewing the legislative history of the 1933 Act said:

> "This (Bill) only applies to restricted and tax exempt land."

The decision of the Circuit Court in this case holding that Section 8 of the Act of January 27, 1933 reimposes restrictions upon the class of lands here involved is contrary to the interpretation of the 1933 Act by the Department of Interior. Section 8 of the Act of January 27, 1933 is printed as Appendix "A" and it will be noted from a reading thereof that this Section merely prescribes the procedure essential to a valid conveyance of certain restricted lands of a full-blood Indian heir, such a conveyance is to be valid only if "approved in open Court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June, 1914." Prior to this Act, such a conveyance could be made with the approval of the County Court having jurisdiction of the estate of the deceased. (Act of April 12, 1926, 44 Stat., 239). As to the reason for an enactment of Section 8 see 54 Interior Decisions 382, 385 (1934) where it is said:

> "* * * The purpose of this provision (Section 8) appears to have been to change the function of the County Courts, in approving conveyances, from a ministerial to a judicial act, the recognition thus given to the jurisdiction of those Courts in the matter of approving conveyances by full-blood heirs evidences a plain purpose on the part of Congress not to disturb the existing jurisdiction of such Courts over lands acquired by the full-blood Indians prior to that enactment."

The Act of 1933 clearly does not repeal the Act of May 10, 1928, or the other prior legislation discussed herein. It merely changes the rule as to restricted and tax exempt land inherited by Indians of one-half to full blood. Existing law as to allotted land is not affected at all. The land involved in this case, while the title thereto was vested in Frank Ned, was unrestricted and taxable. Upon the death of Frank Ned it is the petitioner's contention that the land descended to his full-blood heirs free of restrictions and certainly it will not be contended by the Government that the land was tax exempt.

3. The decision of the Circuit Court in this case is contrary to the legislative history of the Act of 1933.[3]

The bill was sponsored by Oklahoma Congressmen and nowhere is there evidence to be found to support the interpretation of the Act given by the Circuit Court that Congress intended to reimpose restrictions upon unrestricted lands of the class involved in this case inherited by full-blood Indians. It was described by its sponsor Congressman Hastings as follows:[4]

> "Now, Section 2, (Section 8 of the 1933 Act) in brief, only permits or requires that notice be given to probate attorneys, and gives them authority, as a matter of right to go into Court to represent these restricted Indians. As the members of the Committee

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[3] Elements of the 1933 Statute were included in H. R. 15603, 71st Congress. The bill was recommitted to the Committee on Indian Affairs for further consideration, 74 Cong. Rec. 3956-3958. The House later amended the provisions of its own bill into S 6169. 74 Cong. Rec. 7219-7222. The bill as amended was not approved by the Senate. The plan was reintroduced in the 72nd Congress as H. R. 8750 and was discussed by the House, the 75 Cong. Rec. 8163-8170 and by the Senate, the 76 Cong. Rec. 2200. This bill was passed by the 72nd Congress and became the Statute under consideration.

[4] Hearings before the sub-committee of the Senate Committee on Indian Affairs on H. R. 8750, 72nd Congress, First Session, May 16, 1932.

know, in the present Interior Department Bill, we appropriate forty thousand dollars for the employment of probate attorneys. * * *

Now, this Section 2, with reference to the conveyance of restricted lands, requires that probate attorneys be given notice to appear in Court to represent these Indians, and they also have a right of appeal to the District Court.

Senator Wheeler: As I recall there was a good deal of these lands that were being transferred by somebody simply presenting the matter to the Court and the Court approving them and without the Indians being heard, that is the probate attorneys being heard in the matter or notified at all.

Mr. Hastings: There was some criticism along that line, Senator; this section would prevent any criticism of that kind, to require that notice be given to them.

Senator Wheeler: Not only did they not give notice, but my recollection was there was testimony to the effect that the judge or judges signed some of these orders on the street or in other places down there without the probate attorney's knowledge.

Mr. Hastings: That criticism has been made in the press.

Senator Wheeler: That is an outrageous procedure, in my judgment, and there is only one way to do it, and this provision is an exceptionally good provision."

Further in the discussion of the bill the statement of John R. T. Reeves, Chief Counsel, Bureau of Indian Affairs, appears as follows:

Mr. Reeves: "We have at this time something between four and five million dollars belonging to that class of Indians, property that was restricted, under the supervision of the Secretary of the Interior, belonging to restricted allottees of the Five Civilized Tribes. Those allottees are now dead; this property belongs to their heirs; if they are less than full bloods, under existing law, there is a grave question that they

are unrestricted, and the department has no power, right, or jurisdiction or supervision. The enactment of this bill will remove any doubt about the situation.

Mr. Scattergood: That applies to section 1, which Mr. Reeves has spoken of. Section 2 speaks for itself, and is a matter of having in open court, instead of outside of court, the approval of these conveyances.

Mr. Reeves: I would like to say in that connection, Mr. Chairman, that under the practice grown up under existing law the courts have held that the approval of those deeds were purely ministerial functions; they did not have to be done in open court, and without notice to the representative of the Government or anybody else; and it is a very easy matter to get a deed from these full-blood heirs, take it around, have the court approve it—the judge would approve it on the street, after hours, or at 9:00 o'clock at night, if he saw fit so to do—without notice to anyone. This bill would require notice to the representatives of the Government and approval of the deed in open court after notice to the parties.

Mr. Scattergood: And with the right of appeal?

Senator Thomas of Oklahoma: Do you know that section 2 changes the procedure relative to the approval of conveyance from a ministerial act to a judicial act?

Mr. Reeves: It does.

Senator Thomas of Oklahoma: And prevents further approval being made in the nighttime or on the public highway or any other place, and requires it be made in open court?

Mr. Reeves: We feel it would be helpful to the Indians in requiring notice to representatives of the Government and approval of these deeds only in open court afterwards as a judicial proceeding.

Mr. Scattergood: And further with the right of appeal?

Mr. Reeves: There is one further idea, Mr. Chairman, that was brought out yesterday; that is, with reference to the effect of this bill on land and the question of taxation. This bill does not impose any restriction on additional land * * *"

Senator Thomas of Oklahoma inquired of Mr. Reeves as follows:

> Senator Thomas of Oklahoma: Then your interpretation of this bill is it provides two things in the main; first, it extends restrictions on monies and lands of Indians of half blood or more and, second, it changes the ministerial act in approving deeds to one of judicial approval.
>
> Mr. Reeves: Correct, Senator; except as to the first statement that it extends restrictions on land and money; it extends no restrictions on land. It is only on money. The land is taken care of by the Act of May 10, 1928."

From the statement of Mr. Grady Lewis, Choctaw Tribal Attorney, again it appears clearly that the second section of the bill, which ultimately became Section 8 of the 1933 Act, was intended solely to be procedural and there was no indication that Congress considered the reimposition of restrictions upon the class of lands here involved. A number of other attorneys for the Five Civilized Tribes appeared at the hearings before the subcommittee of the Senate Committee on Indian Affairs and gave statements concerning the bill. These statements all appear in H. R. 8750 of the hearings before the Committee and it appears clearly that the sponsors of the bill had in mind as its main objective the matter of putting in force a definite and uniform procedure with reference to the approval of deeds of full-blood Indian heirs affecting allotted lands restricted by the provisions of the Act of May 10, 1928.

Again we refer to the opinion of the Solicitor of the Department of Interior which was approved by the Assistant Secretary of the Interior construing the Act of January 27, 1933, 54 Interior Decisions, 382 (1934) in which it is said:

> "The rules just stated have no application, of course, to lands purchased by restricted Indians with unrestricted monies."

The above clearly indicates that neither the sponsors of the bill nor the officials of the Interior Department, who were interested in the passage of the bill, considered that the Act was in any wise a reimposition of restrictions on lands purchased with unrestricted funds.

We respectfully suggest that the Circuit Court of Appeals gave undue weight to the letter of the Secretary of the Interior addressed the Honorable Edgar Howard, Chairman of the House Indian Committee, a part of which is quoted in the Court's opinion. We submit that when considering the legislative history of the 1933 Act and the statements of the authors of the bill, as set out above, that the explanation given by the Secretary of the Interior in his letter is not contrary thereto. Instead we urge that the proper interpretation of the Secretary's letter is further evidence of the fact that Section 8 of the 1933 Act has to do solely with the adoption of a procedure governing the approval of deeds executed by full-blood Indians conveying their inherited interest in restricted lands.

If the principle decided by the Circuit Court in this case be adhered to, then we have the anomalous situation in which lands purchased by a full-blood Indian with unrestricted funds are alienable and taxable and wholly unrestricted in his hands and yet such lands pass on his death to his heirs subject to the same restrictions that apply to restricted allotted lands.

Under Rule 10 promulgated by the Supreme Court of Oklahoma, no provision is made for approval of deeds to lands other than allotted lands. A reading of this rule would lead clearly to the conclusion that the Supreme Court could then have only had in mind the individual allotment of the deceased Indian and we submit that when the Congress made Rule No. 10 a part of the procedure in Section 8 of the Act of 1933, Rule No. 10 thereby became as much a part of

the law as if it had been written verbatim into the Act. For the full text of this rule see Appendix "B".

4. We respectfully submit that the Circuit Court has decided an important question of Federal Law which should be settled by this court and we submit that if the rule applied in this case is to be given final approval, any lands acquired by a full-blood Indian of the Five Civilized Tribes, wherever situated, would be restricted in the hands of his full-blood heirs. Many of these Indians have gone to the states of California, Kansas, Texas and other States and they have acquired land in those States which is unrestricted in their hands. Approved rolls could no longer be used as a basis on which to determine who is a restricted Indian and the fact that the restrictions that once existed against the allotment have expired would not aid a title examiner, since under the decision of the Circuit Court any person who purchases lands with his own funds and thereafter dies leaving full-blood Indian heirs is restricted in his right to alienate said land.

If the Act of 1933 is to be interpreted so as to include any lands that may be owned by full-blood Indians, irrespective of the source from which it comes, it would logically follow that a personal disability or restriction is thereby placed upon them. It is our opinion that the Act of 1933 was intended to apply only to lands against which restrictions existed at the time of the passage of the Act.

In this case, since title to the land was acquired with unrestricted funds and on an unrestricted form of deed, the Federal restrictions against alienation have no application. It is our view that the Act of 1933 must be taken as a supplement and read in connection with the former Acts of Congress dealing with restrictions, to-wit:

Act of May 27, 1908, 35 Stat. 312.
Act of April 12, 1926, 44 Stat. 239.
Act of May 10, 1928, 45 Stat. 495.

It cannot be given intelligent application if it is treated as it has been by the Circuit Court of Appeals as independent legislation reaching out to restrict lands acquired at private purchase and with unrestricted funds.

Conclusion.

WHEREFORE, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

REUEL W. LITTLE,
Madill, Oklahoma;
W. F. SEMPLE,
Tulsa, Oklahoma;
VILLARD MARTIN,
Tulsa, Oklahoma,
Attorneys for the Petitioner.

APPENDIX "A".

The pertinent provisions of the Act of January 27, 1933, c. 23, 47 Stat. 777, are:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe; Provided, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law: Provided further, That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed one hundred sixty acres: And provided further, That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in Section 3 of the Act approved May 10, 1928 (45 Stat. L. 495).
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> * * * * * * *
>
> Sec. 8. That it shall be the duty of the attorneys provided for under the Act of May 27, 1908 (35 Stat. L. 312), to appear and represent any restricted member

of the Five Civilized Tribes before the county courts of any county in the State of Oklahoma, or before any appellate court thereof, in any matter in which said restricted Indians may have an interest, and no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open Court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914, and said attorneys shall have the right to appeal from the decision of any county court approving the sale of any interest in land, to the district court of the district to which the county is a part.

APPENDIX "B"

Rule 10 of Rules of Procedure in Probate Matters, Adopted by the Justice of the Supreme Court of Oklahoma, June 11, 1914, and Effective July 15, 1914.

Deeds conveying inherited lands of full-blood Indian heirs shall be approved only on the verified petitions of grantors which shall set forth the names of the parties, desciption of the land, roll number of the decedent and grantors and quantum of blood, the permanent residence of the deceased allottee at the time of death, and the character and extent of the interest sold. Said petitions shall be set down for hearing not less than ten (10) days from the date of filing and on one of the two days hereinbefore provided for the confirmation of sale by guardian, advertised in the county where the land is located for one week, and Probate Attorney or local counsel for the Tribe of which the grantor is a member shall be notified upon the filing of the petition. Said land shall be appraised, and testimony of disinterested parties may be required as to the value of the land conveyed, when deemed necessary by the Court. The grantors shall be present and be examined in open court and before such deeds shall be approved, and the Court must be satisfied that the consideration has

been paid in full in the presence of the Court. No petition will be considered when any deed has been previously placed of record upon the land, or taken within thirty (30) days after the death of the allottee. The evidence shall be transcribed by the stenographer and filed of record, in the case, the expense of which, including attorneys' fees, must be borne by the grantee. When it shall appear for the best interests of the Indian, approval will be withheld unless the grantor agrees in writing for the deposit of the proceeds derived from the sale of the land, to be expended subject to the approval of the County Court.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 340

JOHN O. MURRAY, PETITIONER

v.

BUSTER NED, A MINOR; LULEDA BAPTISTE, NEE NED; LEE BAPTISTE, HER HUSBAND; MOSES JOHNSON; STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION; AND THE HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, AND ASSIGNS, IMMEDIATE AND REMOTE, OF WILLIE TOM, DECEASED FULL-BLOOD MISSISSIPPI CHOCTAW, ROLL NO. 927; AND FRANK NED, DECEASED FULL-BLOOD MISSISSIPPI CHOCTAW, ROLL NO. 264; AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the circuit court of appeals (R. 21–24) is reported in 135 F. (2d) 407.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered February 19, 1943 (R. 24). Petition for rehearing was denied March 24, 1943 (R. 26). A second petition for rehearing was denied June 12, 1943 (R. 30). The petition for a writ of certiorari was filed September 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 8 of the Act of January 27, 1933, c. 23, 47 Stat. 777, providing that "no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved" in a prescribed manner, reimposes restrictions upon land originally allotted subject to restrictions, which has been inherited by full-blood Choctaw Indians from an ancestor who purchased it prior to 1933 with county court approval and with unrestricted funds from full-blood heirs of the allottee.

STATUTE INVOLVED

Section 8 of the Act of January 27, 1933, c. 23, 47 Stat. 777, provides:

> That it shall be the duty of the attorneys provided for under the Act of May 27, 1908 (35 Stat. L. 312), to appear and represent any restricted member of the Five

Civilized Tribes before the county courts of any county in the State of Oklahoma, or before any appellate court thereof, in any matter in which said restricted Indians may have an interest, and no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914, and said attorneys shall have the right to appeal from the decision of any county court approving the sale of any interest in land, to the district court of the district to which the county is a part.

STATEMENT

On or about June 23, 1931, Willie Tom, a full-blood Mississippi Choctaw Indian, enrolled as such opposite Roll No. 927, died intestate while seized and possessed of certain allotted land (R. 3–4). This land descended to and became vested in his sole surviving heirs at law who were all full-blood Mississippi Choctaw Indians (R. 4–5).

On October 24, 1931, all the heirs of Willie Tom except one Moses Johnson conveyed their undivided interests in the land to Frank Ned, a full-blood Mississippi Choctaw Indian, Roll No. 264 (R. 5). The deed was duly approved by the County Court of Marshall County, Oklahoma, that court having jurisdiction of the settlement of the estate of the deceased allottee, Willie Tom (R. 5).

Frank Ned did not use restricted funds to purchase this undivided 15/16th interest, nor was the deed on a restricted form (R. 5).

Frank Ned died intestate on or about November 11, 1939, and his interest in the land descended to and became vested in his sole surviving heirs-at-law who were all full-blood Mississippi Choctaw Indians (R. 5–6).

On November 19, 1941, Bessie Pistubbee, one of the heirs of Frank Ned, conveyed by warranty deed her undivided 3/16th interest in the land to the petitioner, John O. Murray (R. 6). This deed was duly recorded, but was not approved by any county court or county judge in Oklahoma (R. 6).

On December 27, 1941, John O. Murray filed suit in the District Court of Marshall County, Oklahoma, seeking a judicial determination of the surviving heirs of Willie Tom and Frank Ned and asking that title be quieted and that the land be partitioned (R. 6–7). Notice of the pendency of the suit was served on the Superintendent of the Five Civilized Tribes. Pursuant to a motion of the United States, the cause was removed on February 16, 1942, to the United States District Court for the Eastern District of Oklahoma. (R. 7–8.) The United States then filed a complaint in intervention alleging that at the time of the execution and recording of the deed to the petitioner, John O. Murray, the land was restricted and inalienable and that the deed was

void because it was not approved by an Oklahoma county court (R. 7–8).

The district court concluded as a matter of law that the land was restricted and that the deed to the petitioner was void because not approved by a county court (R. 11–14). On June 30, 1942, the district court entered judgment to that effect and quieted title in Moses Johnson and the heirs of Frank Ned (R. 14–17).

The circuit court of appeals affirmed the judgment of the district court on February 19, 1943, and later denied two petitions for rehearing (R. 24, 26, 30).

ARGUMENT

1. Petitioner contends (Pet. 3–12) that Section 8 of the act of January 27, 1933 (*supra*, pp. 2–3) was never intended to reimpose restrictions but merely to provide a procedural change in the method of approving conveyances by full-blood Indian heirs. However, Congress has the constitutional power to reimpose restrictions on land which has become freed of restrictions. *McCurdy* v. *United States*, 246 U. S. 263; *Brader* v. *James*, 246 U. S. 88; *Tiger* v. *Western Investment Co.*, 221 U. S. 286. Prior to the instant decision, and in view of the broad, unlimited language of Section 8 as well as the purpose of the legislation as disclosed by the letter (R. 23) of the Secretary of the Interior recommending its passage (H. Rep. No. 1015, 72d Cong., 1st sess., p. 2; S. Rep.

873, 72d Cong., 1st sess., p. 3), the court below had twice decided that Section 8 does reimpose restrictions, thus evidencing that it accomplishes more than a mere procedural change in pre-existing legislation. *Whitchurch* v. *Crawford,* 92 F. (2d) 249; *McCurtain* v. *Palmer,* 121 F. (2d) 1009. The passages from the congressional hearings (S. Subcommittee on Indian Affairs, H. R. 8750, 72d Cong., 1st sess.) upon which petitioner relies (Pet. 7–10), required no different construction, because they related only to the nature of the restrictions, not to their coverage. Likewise, the opinion of the Solicitor of the Department of the Interior of March 14, 1934 (54 Interior Decisions 382), upon which petitioner also relies (Pet. 6, 10), was not to the contrary, because it merely held that Section 8 was not retroactive. The *Whitchurch* case involved a remote inheritance of allotted land from an allottee, while the *McCurtain* case concerned a direct inheritance from an allottee of land purchased with restricted funds. The present case presented simply the question whether Section 8, which had already been construed as reimposing restrictions, applied to an inheritance of allotted land from one who was not the allottee. Because Section 8 unqualifiedly applies to "any full-blood Indian heir," and thus differs materially from the earlier Act of May 27, 1908, as amended April 12, 1926, c. 115, 44 Stat. 239, which deals with conveyances by full-blood Indians of

lands "acquired by inheritance or devise from an allottee of such lands," an affirmative answer was plainly required, particularly as Congress would have referred to prior legislation and also made provision for devisees as well as heirs of the allottee had it intended no substantial change in existing legislation.

2. Petitioner's view (Pet. 3–5, 12) of the effect of the decision below upon the security of titles in Oklahoma and other states has no merit. Since Section 8 clearly reimposes restrictions on allotted lands inherited by full-blood Indian heirs from one who is not an allottee, it is not material what effect a decision so holding has upon the security of titles. In the absence of evidence that Congress was concerned more with the security of titles than with the reimposition of restrictions, the reimposition of the restrictions must be given effect. Furthermore, purchasers of Oklahoma land cannot rely upon the record evidence alone to determine whether or not land is restricted; they must also take into account the decisions construing legislation dealing with the Five Tribes. Consequently, the fact that the instant case was decided one way rather than another adds little to their title problems in this respect. Also, since the decision below applies only to allotted land, or as in the *McCurtain* case (121 F. (2d) 1009 (C. C. A. 10)) to land purchased on a restricted form of deed, such purchasers will have the same clue

which they must rely on under other decisions construing Indian legislation to determine whether the land "was owned by ancestors of Indian blood and that the heirs are full-blood Indians" (Pet. 3).[1]

CONCLUSION

The decision below is correct and involves no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] Moreover, neither the instant decision nor the decisions in *Whitchurch* v. *Crawford*, 82 F. (2d) 249 (C. C. A. 10), and *McCurtain* v. *Palmer*, 121 F. (2d) 1009 (C. C. A. 10), concern other than Oklahoma land. And the terms of Section 8 calling for approval of conveyances by the probate courts of Oklahoma establish that the legislation applies only to Oklahoma land. Consequently, the decision below can have no effect upon the security of titles to lands in other states.

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